CORPORATE PRIVILEGE AGAINST SELF INCRIMINATION.

In 1904, an author so conservative and exact of statement as Professor Wigmore wrote in his treatise on evidence:[1]

"It is also plain, on the other hand, that a *corporation,* when discovery is sought from it as such, is to be equally protected from disclosure, so far as it is capable of committing a criminal act."

In 1910, Judge Lacombe in the United States Circuit Court for the Southern District of New York held squarely that a corporation

"Cannot avail of the provisions of the fifth amendment to the Constitution, which declares that no person 'shall be compelled in any criminal case to be a witness against himself' * * *."[2]

And in January, 1911, Judge Hand in the same court upheld the validity of a subpœna, directed to no human being but solely to a coporation and commanding it to produce books and papers before the Grand Jury in a proceeding against itself.[3] He disposed of respondent's insistence that, by a long series of precedents, corporations are persons within the Bill of Rights, and that at least, if a part of the "people" to be protected by the Fourth Amendment, they are persons within the "Fifth," by stating "These are considerations solely for the Supreme Court, they do not concern a Judge of first instance."

The process by which Professor Wigmore's dictum has been, temporarily at least, destroyed and every vestige of corporate immunity against self incrimination swept away in the short interval between 1904 and 1911 presents a curious intermingling of motives, purposes and reasoning. The causal psychology of the change is two-fold—the revolt against what a recent writer has called "coddling the criminal"[4] and a revolt against corporate immunity and privilege generally. It may be that each of these motives can be justified. As to the former, Professor Wigmore's profound consideration of the policy of the privilege against incrimination, weighing judicially its advantages and its evils, leads

[1] 4 Wigmore, Evidence 3116.

[2] *In re* American Sugar Refining Co. (1910) 178 Fed. 109.

[3] *In re* Bornn Hat Company (1911) 184 Fed. 506.

[4] Coddling the Criminal by C. C. Nott Jr. (1911) 107 Atlantic Monthly 164.

him to the conclusion that "The privilege therefore should be kept within limits the strictest possible."[5] As to the latter, the general attack on corporate abuse may be justly entitled to use the destruction of this historic privilege as a weapon. With the justification of these motives we are not here, however, primarily concerned. We refer to them but to furnish explanation, not excuse, for the reasoning that has prompted the change and curiously warped the rules of law on this subject out of all possibility of logical arrangement until the final word shall have been spoken by the Supreme Court and order once more restored out of chaos.

The case which gave rise to this confusion was the so-called *Hale* case.[6] Mr. Hale was Secretary of the McAndrews & Forbes Company. He was served with a subpœna *duces tecum* to produce before the Grand Jury books and papers of the corporation in a proceeding against the corporation under the Anti Trust Law of July 2, 1890. He refused to obey the subpœna, asserting both his own privilege and the privilege of the corporation. His plea of personal privilege was held to be bad, both by the Circuit Court and by the Supreme Court, because of the Immunity Act of Feb. 19, 1903, which the Supreme Court had held afforded the witness complete protection against prosecution. The decision of the lower court did not really involve the questions with which we are here concerned, and held that the subpœna was so general as to amount to an unreasonable search; that it therefore violated the rights of Hale under the Fourth Amendment, guaranteeing him against unreasonable searches and seizures; but that he would not be discharged because of the unwillingness of the court to interfere with the action of the Judge of concurrent jurisdiction, who had made the contempt order and in view of the fact that an appeal was to be taken and that he would be released on bail pending the appeal.[7] In the Supreme Court the actual decision of the court went no further than that Hale could not plead his own privilege because of the immunity statute and could not plead the corporation's privilege because the privilege was personal to the witness only, and the witness could not plead the privilege of a third party, even though that third party was a corporation of which he was an officer.

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[5] 4 Wigmore, Evidence 3102.

[6] *In re* Hale (1905) 139 Fed. 496; Hale *v.* Henkel (1906) 201 U. S. 43.

[7] Brown *v.* Walker (1896) 161 U. S. 591.

There were handed down, however, four opinions in all: the opinion of the court by Mr. Justice Brown, concurring opinions by Justices McKenna and Harlan, and a dissenting opinion by Mr. Justice Brewer. From each of these opinions considerable comfort and considerable perturbation has been drawn by counsel on both sides of the controversy. And the confusion resultant from the decision is traceable to the blind following of excerpts from the opinions, not always wholy definite in themselves, and, standing alone, not always wholly consistent with other parts of the opinions. A careful study of those opinions is the necessary basis for consideration of the present status of the question.

Mr. Justice Brown first holds that Hale could not plead his own privilege under the Fifth Amendment, because of the immunity guaranteed to him by the act of Feb. 25, 1903. He writes:

"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—* * *. But if the criminality has already been taken away, the Amendment ceases to apply."

He then considers the immunity statute and holds it to be an absolute immunity to Hale. The opinion then continues:

"But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which the appellant was the agent or representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person."

It should be noted that Mr. Justice Brown here does not say that the corporation has no privilege.

He says merely that the witness cannot assert the corporation's privilege in refusing to answer orally. Then follows:

"The question whether a corporation is 'a person' within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some of its agents or employés."

This refers obviously to oral testimony and not to the production of documents.

An officer of a corporation subpœnaed to testify orally could not assert the corporation's privilege. The corporation cannot testify orally.

So that, as a matter of physical possibility, a corporation cannot assert the immunity of the Fifth Amendment to oral questioning because a corporation cannot be a witness under oral questioning.

Mr. Justice Brown continues:

"The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself,* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. * * * Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that the counsel will not be allowed to make the objection."

Therefore, there is nothing in this language which holds that a corporation, when put in the only physical situation in which it may be compelled to give evidence against itself, namely, by the production of documents, cannot assert the immunity of the Fifth Amendment or of the common law. Mr. Justice Brown then takes up the question of the production of documents, and reaches the conclusion that to compel a man to produce his papers is compelling him to be a witness against himself, and is the equivalent of a search and seizure, under the Fourth Amendment.

The Justice then refers to the fact that Hale, however, was immune from prosecution, and continues:

"Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. * * *

"If, whenever an officer or an employé of a corporation was summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers."

This last language certainly tends to the evasion of the corporate privilege. But two things are to be noted of it: First, it is really *dictum.* The Hale case was decided conclusively by the proposition that Hale, personally subpœnaed, could not assert the corporation's privilege. Second, the language limits itself to a

case where the officer is personally subpœnaed. It does not suggest what the ruling would be, were the corporation itself subpœnaed to produce. It is true that Mr. Justice Brown further elaborates a distinction between a corporation and an individual, pointing out that corporate privileges should involve corporate responsibilities, his thesis being represented substantially by the following language:

"While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

But, again it is to be remembered that the decision did not really involve this question.

As to the Fourth Amendment guaranteeing against unreasonable searches and seizures, Mr. Justice Brown writes:

"We do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."

In other words, he carefully states that he is not holding that a corporation is not connoted in the word "people" in the Fourth Amendment, where the people are guaranteed against unreasonable searches and seizures.

Mr. Justice Harlan for himself alone holds substantially that a corporation has no rights under either the Fourth or Fifth Amendment.

Mr. Justice McKenna's opinion is thus summed up by Judge Lanning of the Circuit Court of Appeals:[8]

"Mr. Justice McKenna leaves open the question whether a corporation can claim immunity under either the fourth or the fifth amendment."

It remains to be considered whether these utterances, viewed on the light of precedent and subsequent citation, justify the conclusion that corporate privilege against self incrimination by production of documents is destroyed. Professor Wigmore points out the ancient origin of the privilege[9] to corporations. In 1744, inspection of corporate books was not allowed where there was an information against justices for granting licenses.[10] In 1749 an

[8]Cassatt *v.* Mitchell Coal & Coke Co. (1907) 150 Fed. 32.

[9]4 Wigmore, Evidence 3116 note.

[10]Rex *v.* Cornelius (1744) 2 Stra. 1210.

inspection of the books of Oxford University, a corporation, was refused, because relating to the defendant's behavior as a member of the particular corporation.[11]

In 1749 a corporation secretary's refusal to produce documents on account of their tendency to incriminate "for whom I am interested" and himself, was sanctioned. The Supreme Court of Pennsylvania writes:[12]

"We have carefully considered the position taken by plaintiff's counsel on the re-argument, that we may require the defendant corporation to produce the required writings, even though a natural person in a like case could not be called upon for their production. We are not able to agree with the reasoning. We think that the rules of evidence and the rules of law for the production of writings, are essentially the same whether the defendant is a natural or an artificial person."

A corporation has been held to be a person within the meaning of the penal statutes.[13] It is a citizen under the provisions regarding jurisdiction of the Circuit Court.[14] It is a person within the Usury Statute;[15] within the meaning of the Treaty of Peace;[16] within the Fourteenth Amendment;[17] within the Statute of Limitations;[18] within the Act of Congress of 1797 applying to preferences;[19] within the Bankruptcy Act; within Section 4901 of the Revised Statutes, providing a penalty for marking an unpatented article "Patented."[20]

And as we have seen, Mr. Justice Brown himself in *Hale* v. *Henkel* holds that it is embraced in the word "people" under the Fifth Amendment. It is impossible to frame a logical theory consistent with these precedents that shall exclude it from the connotation of "person" in the Fifth Amendment. Did Mr. Justice Brown mean so to exclude it?

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[11]King *v.* Purnell (1748) 1 W. Bl. 37, 45.

[12]Logan *v.* Pennsylvania R. Co. (1890) 132 Pa. St. 403, 408.

[13]United States *v.* Amedy (1826) 11 Wheat. 392; King *v.* Harrison (1777) 2 East's Pleas of the Crown 927.

[14]Louisville Railroad Co. *v.* Letson (1844) 2 How. 497; Marshall *v.* B. & O. R. R. (1853) 16 How. 314.

[15]Thornton *v.* The Bank of Washington (1830) 3 Pet. 36.

[16]Society etc. *v.* New Haven (1823) 8 Wheat. 461.

[17]Gulf, Colorado & Santa Fé R. R. *v.* Ellis (1897) 165 U. S. 150, and cases there cited; Santa Clara County *v.* South. Pac. R. R. (1886) 118 U. S. 394.

[18]Tioga R. R. *v.* Blossburg R. R. (1873) 20 Wall. 137.

[19]Beaston *v.* Farmer's Bank (1838) 12 Pet. 102.

[20]London *v.* Dunbar Corp. (1910) 179 Fed. 506.

In *McAlister* v. *Henkel,*[21] decided simultaneously with *Hale* v. *Henkel,* he writes:

"For reasons already partly set forth, we think that the immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial."

If he had meant his language, largely argumentative *dictum,* as we have seen, in the *Hale* case, so to exclude it, it cannot be believed that this simultaneous decision, would be based not upon the ground that a corporation had no privilege, but on the thesis that an individual could not assert that privilege as a bar to personal oral examination.

In the case of *Wilson* v. *United States,* argued in the Supreme Court but not yet decided, a corporation was subpœnaed to produce its books. The subpœna was answered by its officer, Wilson, with the statement that he had the books and that they tended to incriminate him. The Circuit Court overruled this objection apparently on the principle that he could not plead *his* privilege when the corporation was subpœnaed,—the exact converse of *Hale* v. *Henkel.*

Later decisions other than those of Judges Hand and Lacombe heretofore referred to, seem to regard the question as open. In *Cassatt* v. *Mitchell Coal & Coke Co.,*[22] Judge Lanning writes, after summarizing the various opinions in the *Hale* case, that

"These varying expressions of opinion emphasize the impropriety of any expression of opinion,"

without full argument on the question of the existence of corporate privilege against self incrimination. In *Consolidated Rendering Co.* v. *Vermont,*[23] Mr. Justice Peckham said:

"The fifth objection is also without merit, even upon the assumption that in such a case as this the company could take the objection through the witness. The court simply held that it could not determine whether the objection as to incrimination was valid until the books were produced for inspection by the court, though before they were to be used in evidence."

He places his ruling squarely, not on the proposition that the corporation has no privilege, but on the statement that if it has

[21] 201 U. S. 90, 91.
[22] *Supra,* 45.
[23] (1908) 207 U. S. 541, 552.

one, it must assert it in a particular way. Professor Wigmore in his supplemental volume writes:[24]

"The decision in *Hale* v. *Henkel, supra,* may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one; or on the ground that the power to create involves the power to forfeit. But the opinion does not face the argument *contra* based on the criminal capacity of a corporation."

Judge Hand in the case of the Bornn Hat Company heretofore referred to, regarded the question sufficiently doubtful to justify a *supersedeas* on the appeal to the Supreme Court.

But to-day, in the Southern District of New York at all events, it is temporarily, at least, the law that a corporation has no privilege against self incrimination. The distinction between a corporation and an individual in this respect is not based on any legal logic. If it is desirable to curtail the privilege generally, appropriate constitutional amendment to that end is the proper course. In its final analysis the fining of the corporation is deprivation of the property of its stockholders, and the Fifth Amendment looks by its terms to the protection, not only of life but of liberty and property. And so long as those guarantees stand, the property of individuals cannot reasonably be appropriated because it exists in corporate form, by a process which, if attempted to be applied to individuals, would everywhere be regarded as a violation of fundamental privilege.

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[24] 5 Wigmore, Evidence 228.